Vinisa II, Ltd. and Pisa Coat Co., Inc. *and* Local 162, International Ladies' Garment Workers' Union, AFL–CIO. Case 22–CA–17603

August 7, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The Board must decide whether the General Counsel has established a prima facie case that Pisa Coat Co., Inc. is the alter ego of Vinisa II, Ltd., and whether Pisa Coat-Vinisa II violated Section 8(a)(5), (3), and (1) of the Act by unlawfully withdrawing recognition from the Union, Local 162, International Ladies' Garment Workers' Union, AFL–CIO.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Vinisa II, Ltd. and Pisa Coat Co., Inc., West New York, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dorothy Karlebach, Esq. and *Stephen Holroyd, Esq.*, for the General Counsel.
Stuart Bochner, Esq. (Horowitz & Pollock, P.C.), filed a brief for the Respondent.
Jesse H. Strauss, Esq. (Reitman, Parsonnet & Duggan), of Newark, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint as amended alleges that Pisa Coat Co., Inc. (Pisa) is the alter ego of Vinisa II, Ltd. (Vinisa, II), and that Vinisa II-Pisa engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Vinisa II-Pisa allegedly unlawfully withdrew recognition from Local 162, International Ladies' Garment Workers' Union, AFL–CIO (the Union) as the exclusive collective-bargaining representative of its employees, failed to honor the collective-bargaining agreement it had with the Union for those employees, and laid off those employees unilaterally because they were members of the Union.

Pisa denies that it is the alter ego of Vinisa II.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and by Pisa, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

As discussed further below, Vinisa II, and Pisa were engaged in the manufacture of ladies coats in the State of New Jersey. The answer to the complaint admitted that they performed services annually which were valued in excess of $50,000 for customers located outside the State of New Jersey.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE REQUESTS FOR ADJOURNMENT

The hearing opened and closed on the morning of December 9, 1991. No one appeared at the hearing for Vinisa II or for Pisa. Requests had been made by Pisa's counsel to postpone the hearing. The rulings thereon and on related requests are contained in various orders. The following chronology summarizes those matters.

Pisa-Vinisa II, then represented by different counsel, had entered into a settlement agreement in late October 1991 when this case had earlier been scheduled for hearing. As a result, the hearing then was postponed indefinitely.

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[1] On March 12, 1992, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The judge states that Minervini operated his coat manufacturing business under the name of Min Dee Fashions and Polk Street Fashions in 1987, and that in 1988, Minervini reopened the shop as Vinisa II. We note that former Vinisa II employee Marija Stepanov testified that she worked for Minervini at Min Dee and Polk Street Fashions in 1989, and at Vinisa II in 1990. This testimony is supported by documents entered into evidence by the General Counsel at the hearing, indicating that in 1989, Minervini's shop was called Polk Street Fashions, Inc., and in 1990 it was called Vinisa II. The judge's error does not affect the outcome of the case.

[3] The General Counsel has filed a motion to strike the Respondent's counsel's affidavit attached to its exceptions to the judge's decision. The motion is granted because this affidavit was not admitted into evidence at the hearing and therefore is not part of the record in this proceeding. *Coppinger Machinery Service*, 279 NLRB 609 fn. 1 (1986); *Redok Enterprises*, 277 NLRB 1010 fn. 1 (1985). Further, we note that even if accepted into evidence, the contents of the affidavit would not affect the outcome of this case.

Although the General Counsel alleged that Vinisa II and Pisa Coat are alter egos and a single employer, the General Counsel's arguments and the judge's analysis focus exclusively on the issue of alter ego status. (There is no assertion that in the absence of Vinisa II and Pisa Coat's status as alter egos, they would constitute a single employer.) We shall therefore amend the judge's Conclusion of Law 1 to read as follows: ''The Respondent, Vinisa II and Pisa Coat, its alter ego, constitute an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.''

On November 7, 1991, Steven Horowitz, Esq. of the law firm, Horowitz & Pollack, advised Region 22 that he was now representing Respondent. He indicated that Respondent was not going to comply with the prior settlement agreement, and that he wanted the matter set for trial.[1]

On November 12, 1991, the hearing was rescheduled to December 9, 1991, at 9:30 a.m.

On November 27, 1991, Horowitz requested a 45-day postponement asserting, inter alia, that ''there presently exists a conflict with Region 29'' on December 9. The General Counsel and the Union opposed the request. Associate Chief Administrative Law Judge Edwin H. Bennett, by order dated December 3, 1991, denied the request, noting the vague and uncertain reasons offered by Horowitz and noting other grounds for denying the request. [On the same date, November 27, that Horowitz had requested the 45-day postponement based on an asserted conflicting matter in Region 29, Region 29 issued an order in the only case it had listed for hearing for December 9 which involved the firm of Horowitz and Pollack. By that order, that Region 29 case was rescheduled. A copy of that order was sent on November 27 to Chuck Ellman at Horowitz and Pollack. Horowitz never advised Judge Bennett that Ellman was the one handling the Region 29 case or that there no longer was a conflicting matter in Region 29.]

On Friday, December 6, 1991, Stuart Bochner of Horowitz and Pollack, requested[2] that the hearing on Monday, December 9, be rescheduled from 9:30 a.m. to 1:30 p.m. on the ground that he was engaged before the U.S. Court of Appeals for the Second Circuit in Case 91-7809. He did not note in his request why Horowitz was not available for the hearing, nor did he advise that he, himself, would not be able to continue on December 10. He was scheduled to return to a hearing before another administrative law judge in a hearing which was resuming on December 10. Neither did Bochner seek to explain why he accepted the instant case at such a late date, especially in view of the conflicting matter he was handling. His request was denied by letter dated December 6, 1991.

On December 9, 1991, no one appeared for the Respondent for the hearing at 9:30 a.m. At my direction, counsel for the General Counsel called Horowitz' office, Horowitz advised that he would appear when Bochner was available. The hearing then opened and closed without any appearance from the Respondent. Bochner wrote later that day seeking to reopen the hearing. Once again, there was no explanation offered as to Horowitz' unavailability or why Horowitz never informed Judge Bennett of Region 29's postponement of the asserted conflicting matter there or even why Horowitz had been assigned to handle that Region 29 matter in place of Ellman. Nor did Bochner state why he was taking over this case from Horowitz when he knew he was unable to be present as scheduled on December 9 or on the succeeding day or days. By letter dated December 13, General Counsel opposed the request to reopen . By letter of December 19, 1991, I denied the request and noted that the December 9 request, General Counsel's December 13 letter of opposition, and my letter of December 19 were made part of the record as ALJ Exhibit 1 A, B and C, respectively.

On January 6, 1992, the Respondent filed a request with the Board for special permission to appeal my ruling of December 6. I did not receive a copy of the request and consequently do not know if Bochner had advised the Board that he was available only for the afternoon of December 9 but not on the succeeding day or days. The Board, by Order dated January 20, 1992, affirmed the December 6 ruling. The Respondent apparently did not file a request to appeal my ruling of December 19. It is not clear that it ever advised the Board of that ruling.

Respondent repeatedly has shown a lack of candor in its requests, to a point bordering on a disdain for the Board's processes. This should not be countenanced.[3]

III. THE ALLEGED UNFAIR LABOR PRACTICES

The General Counsel contends, in essence, that Mauro Minervini, as president and owner of Vinisa II, closed down its operations in early 1991 and, a few months later, surreptitiously relocated the business to a nearby town under the Pisa name. The General Counsel alleges that this was done to avoid Vinisa II's obligations under its collective-bargaining agreement with the Union and that Vinisa II-Pisa failed to hire or to recall from layoff the employees of Vinisa II in contravention of the provisions of that agreement and because the employees were members of the Union.

In support of those contentions, the General Counsel offered the following testimony.

Marija Stepanov, a button-hole machine operator, and Carmen Chappora, a union business agent, testified that Minervini, in virtually every year from 1985 to 1991, has moved his ladies coat manufacturing operations to different locations, using different names. Thus, Stepanov testified that in 1985, she worked for Evita Fashions in Hoboken, New Jersey, as a button-hole operator on ladies coats under Minervini, the owner, and that Evita Fashions was under contract with the Union. She testified further that it is customary in ladies coat manufacturing for a company to close down during the winter months and to resume operations in the spring. Pursuant to that practice, she had been laid off in the winter of 1985–1986 from Evita. In April 1986, Minervini telephoned Stepanov and told her to report to work. She returned to the same job. The company, however, had been changed to Vinisa, Ltd.; in all other respects, Vinisa, Ltd. was the same as Evita Fashions. In the ensuing winter season, she was laid off as was customary. Minervini called her in the spring of 1987. She reported to work for him at Min Dee Fashions, located at 5508 Polk Street, in West New York, New Jersey. When the Union learned that Min Dee Fashions was operating as nonunion, it called a strike of the employees. The strike was settled when Minervini agreed to ''go back to the Union.'' He recognized the Union at that location. He, however, then changed the name from Min Dee Fashions to Polk Street Fashions. Stepanov related that, as before, she continued doing the same type work for Polk as she had done when she was with

[1] This is an excerpt from the order issued on January 30, 1992, at the direction of the Board.

[2] His letter was dated December 5 and was received on December 6.

[3] The Respondent even urged that the failure of its principal, Minervini, to appear at the hearing pursuant to a subpoena served on him by General Counsel warranted, in effect, postponement of the hearing or dismissal of the complaint.

Evita, Vinisa, and Min Dee and that all those operations appeared to be identical, involving the making of ladies coats.

In the following winter, Stepanov was laid off along with the other employees. When she returned in the spring of 1988 to that same facility, the only change was that Minervini called the company Vinisa II.

Chappora, the Union's business agent testified that on behalf of Vinisa II, Minervini had signed ''the same type contract'' as the one received in evidence—the 1988-1991 collective-bargaining agreement between the International Ladies' Garment Workers' Union, AFL–CIO and the Association of Rain Apparel Contractors, Inc. Her testimony in that Vinisa II thereby joined that Association, resulting in the establishment of the 3-year contract. Copies of correspondence, in evidence, between the Union and the Association, confirm that Vinisa II was so bound.

In January and February, 1991, Chappora, as was her practice visited the facility where Vinisa II had been located and found that Vinisa II was no longer there. She learned from some of the laid-off employees that Minervini was working in a building on 5505 Palisade Avenue in West New York, New Jersey.

Stepanov went to that facility in April 1991 and was told by Minervini there that his company was nonunion. Stepanov testified further that she did not ask to work there as she would work only for a company under contract with the Union. When Chappora later visited that same building, she was not allowed inside. She was told by a person there, who was responsible for security, that there were no union shops in that building.

After several unsuccessful attempts to get into that building, Chappora, in July 1991, found an unlocked door. She entered and was able to reach the floor where Minervini was located. She, as did Stepanov, recognized a man named Pedro working there; he had been a foreman at Vinisa II. Minervini told Chappora that he, Minervini, was only the manager. She observed about 25 employees there, making ladies coats. None had been employed at Vinisa II.

The General Counsel placed in evidence an affidavit signed by Minervini in April 1991. Therein, he stated that he was employed by Pisa Coat, Inc., a company owned by his mother. The affidavit also related that she does not ''run'' the shop, that he will do the hiring and firing of employees and set their wage scales and that he will start up the shop as soon as he is able to locate a jobber who will give him work. His affidavit noted also that some of Vinisa II's machines have been set up for Pisa's operations so that Pisa can function as soon as it obtains work.

Minervini's affidavit contains his complaint that Vinisa II could get work only from nonunion jobbers who apparently did not pay Vinisa II enough for it to make the payments to the benefit funds under the Association-Union contract. Minervini stated in his affidavit that he ''had continually asked the Union to get me work with Union jobbers [b]ecause those jobbers will pay all the benefits.''

In determining whether one business entity is the alter ego of another, the Board considers a number of factors, none of which, by itself, is determinative. Among the factors are common management, ownership, common business purpose, the nature of operations, and supervision; common premises and equipment, common customers, i.e., whether the employers constitute ''the same business in the same market''; as well as the nature and extent of negotiations and formalities surrounding the transaction; whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.[4]

The evidence is clear that the operations of Vinisa II and Pisa were managed solely by Minervini; Vinisa II and Pisa were engaged in the manufacture of ladies coats; that the machines Vinisa II and Pisa used were in good part identical; that Minervini supervised both operations assisted by a Vinisa II foreman; that Minervini solicited business for both companies from jobbers, i.e.—solicited the same market; that the relocation of the business by Minervini had substantial precedent, one instance of which had, in 1987, involved an effort by Minervini to avoid the Union; and that again in 1991, Minervini set up Pisa as nonunion in the context of concern that the Union had failed in what he perceived as its obligation to find him jobbers who would pay enough for Vinisa II to meet its contractual obligations. Minervini's affidavit recites that his mother owns Pisa. The Board has held, in that regard, that when corporations which are substantially the same other than ownership but where members of the same family are the owners, the totality of the circumstances warrant its finding that ownership and control of both are substantially identical.[5] To find otherwise based on Minervini's statement that his mother owns Pisa is to ignore the reality of the situation.[6]

In view of the foregoing, I find that Pisa is the alter ego of Vinisa II, that it was established as an attempt to evade Vinisa II's contractual obligations to the Union and that, in conjunction with that attempt, Pisa failed to recall the employees of Vinisa II because they were members of the Union, and further that it unilaterally changed the recall procedure established in the collective-bargaining agreement.

CONCLUSIONS OF LAW

1. The Respondent, Vinisa II, and Pisa, its alter ego, constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent, Vinisa II-Pisa, engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by having:

(a) Withdrawn recognition from the Union as the exclusive collective-bargaining representative of its nonsupervisory production, maintenance, packing, and shipping workers.

(b) Unilaterally rescinded the recall provisions of the collective-bargaining agreement it has with the Union which covered those employees.

4. The Respondent, Vinisa II-Pisa, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act[7] by having failed to recall from layoff the Vinisa II employees because of their membership in the Union.

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[4] *Fugazy Continental Corp.*, 265 NLRB 1301–1301 (1982).

[5] *Crawford Door Sales Co.*, and *Cordes Door Co.*, 226 NLRB 1144 (1976).

[6] *Weinreb Management*, 292 NLRB 428, 431 (1989), and cases cited therein.

[7] The complaint was amended to allege a violation of Sec. 8(a)(3), although the underlying unfair labor practice charge contained no

Continued

5. The unfair labor practices described in paragraphs 3 and 4 above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent, Vinisa II-Pisa, has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, Vinisa II-Pisa, shall be ordered to offer its nonsupervisory production, maintenance, packing and shipping workers who were laid off in the winter of 1990-1991 reinstatement to their former jobs or, if those jobs are no longer available, to substantially equivalent positions without prejudice to their seniority or other rights and privileges and shall make these employees whole for lost pay they normally would have received, in accordance with the formula prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent, Vinisa II-Pisa, shall further be required to (1) notify the Union in writing that it recognizes the Union as the exclusive collective-bargaining representative of its nonsupervisory production, maintenance, packing and shipping workers, (2) abide by the terms and conditions of its collective-bargaining agreement with the Union, including making all the requisite fund and other contributions thereunder, in accordance with *Merryweather Optical Co.* 240 NLRB 1213 (1979).

On these findings of fact and conclusions of law, and on the entire records, I issue the following recommended[8]

ORDER

The Respondent, Vinisa II, Ltd. and Pisa Coat Co., Inc., West New York, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and to bargain collectively with Local 162, International Ladies' Garment Workers Union, AFL–CIO as the exclusive representative of its nonsupervisory production, maintenance, packing, and shipping workers.

(b) Failing to honor the provisions of the collective-bargaining agreement it entered into with the above Union for these employees.

(c) Failing to recall from layoff those employees so represented by its Union who were laid off in the 1990–1991 winter contrary to the provisions of that agreement and because they were members of the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to employees laid off in the winter of 1990–1991 to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, replacing if necessary any employees hired in their place and make them whole, with interest, for any loss of pay suffered by reason of their not having been recalled earlier, in the manner set forth in the remedy section above.

(b) Notify the Union in writing that it is recognized as the exclusive collective-bargaining representative of the employees described above.

(c) Apply to these employees the terms and conditions of the collective-bargaining agreement covering them, including paying the moneys due for fund and other contributions, as provided for in the remedy section above.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts owing under the terms of this Order.

(e) Post at its plant copies of the attached notice, marked ''Appendix.''[9] Copies of the notice on forms to be provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places at these locations, including all places where notice to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

such allegation. As the same evidence offered to support that allegation was used to support the refusal to bargain allegation, the amendment was appropriate. See *Pergament United Sales*, 296 NLRB 333 (1989).

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post, and abide by the terms of, this notice.

WE WILL NOT refuse to recognize Local 162, International Ladies' Garment Workers' Union, AFL–CIO as the exclusive collective-bargaining representative of our nonsupervisory production, maintenance, packing, and shipping workers or fail to give effect to the collective-bargaining agreement we have with this Union for those employees.

WE WILL NOT fail or refuse to recall any of those employees from layoff in contravention of the applicable provisions of that collective-bargaining agreement or because they are members of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify the Union in writing that we recognize it as the exclusive collective-bargaining representative of our employees and WE WILL honor all the terms of our contract with it, including making fund and other contributions.

WE WILL offer immediate and full reinstatement to all our employees represented by the Union in early 1991 to their former jobs or, if those jobs no longer exist, to substantial equivalent jobs, without prejudice to their seniority or other rights and privileges, replacing if necessary any employees who were hired in their place, and WE WILL make them whole, with interest, for any pay they lost as a result of their not having been recalled.

VINISA, LTD. AND PISA COAT CO., INC.